A **BALBEER SINGH KARAM SINGH & ORS**

v.

SENTUL RAYA SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHD ZAWAWI SALLEH JCA
UMI KALTHUM ABD MAJID JCA
[CIVIL APPEAL NO: W-02-1490-07-2012]
C 12 JUNE 2014

CONTRACT: *Damages - Specific performance - Contract incapable of performance - Whether parties entitled to damages when prayer for specific performance dismissed - Specific Relief Act 1950, s. 18(5)*

D ***CONTRACT:*** *Sale and purchase of property - Failure to complete - Whether agreement incapable of performance - Whether purchasers entitled to compensation in lieu of specific performance - Whether purchasers entitled to liquidated and ascertained damages - Whether rate of damages dictated by developers - Specific Relief Act 1950, ss. 18(2) & (5)*

E The respondent entered into sales and purchase agreements ('SPAs') with the appellants in respect of units in Villa Perhentian Condominium ('Villa Perhentian'). Clause 22(1) of the SPAs provided for delivery of vacant possession within 36 months from
F the date of the respective SPAs, while cls. 22(2) and 24(2) provided for liquidated damages in the event of delay. However, after completing some 30% of the construction works, the respondent suspended all the work, and offered to refund all monies paid towards the purchase price. The appellants declined
G the offer. Subsequently, the respondent abandoned Villa Perhentian and proceeded to build another condominium called 'the Saffron' on the same site, for sale. The appellants, therefore, filed claims against the respondent, *inter alia*, for specific performance and/or damages *in lieu* thereof, special damages,
H general damages and/or exemplary damages. The High Court disallowed the appellants' claim for specific performance of the SPAs and allowed damages in the sum of RM120,000 *in lieu* thereof. The High Court further held that the assessment of damages on the basis of value of 'the Saffron' was misconceived
I and that the amounts claimed under liquidated ascertained

damages ('LAD') and further claims as loss of profit and exemplary damages constituted bare claims. In the instant appeal, the appellant prayed for, *inter alia*, (i) damages in the sum of RM120,000 be set aside and substituted with the amounts for LAD pursuant to cls. 22(2) and 24(2); (ii) general damages; and (iii) order for the return of deposits. In the cross-appeal, the issues raised by the respondent were: (i) whether an award of general damages may be made after refusing specific performance in the absence of a pleaded case for damages; and (ii) the award of RM120,000 as damages in absence of any evidence and/or submissions by the parties was arbitrary.

Held (order accordingly)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Section 18(5) of the Specific Relief Act 1950 ('SRA') provides that the jurisdiction conferred under s. 18 may be exercised notwithstanding that the contract had become incapable of performance. Therefore, the appellants, having prayed for damages, were entitled to consideration for damages even if their prayer for specific performance was dismissed. (para 15)

(2) A party not in breach is entitled to damages that the party is entitled under the law. The appellants were entitled to refuse refund of deposits or payments made and seek what was due under their respective SPAs. However, it is a settled principle that a plaintiff is under a duty to take reasonable steps to mitigate the loss consequent upon a defendant's wrong. The appellants in this case could have taken steps to mitigate their losses when it became certain that Villa Perhentian was not merely suspended but would not be completed at all. In the absence of evidence as to when the appellants became aware of it, the date of the last offer to them to refund the payments was the best evidence in respect of the period for which LAD for delay was payable. (para 17)

(3) As for the rate of the LAD, the terms of the SPAs were not dictated by the appellants. Instead, the term as to the rate for LAD was from the respondent. Whether the rate was too high had not been raised in issue by either party and hence, it did not call for consideration of the application of s. 75 of the SRA. (para 18)

(4) The respective SPAs had become incapable of performance through no fault or breach of the appellants. The facts showed that the respondent chose to breach the SPAs with the appellants. Pursuant to s. 18(5) of the SRA, the court was not precluded from awarding damages, and pursuant to s. 18(2), the court must award compensation accordingly *in lieu* of specific performance. In the circumstances, it was appropriate that the compensation be assessed by comparison with average market value of comparable units in the vicinity and deducting therefrom the purchase price under the SPAs in each case. The appellants had paid 30% and there was no evidence that they were in any difficulty to make payment had the Villa Perhentian been completed and delivered as agreed. (para 19)

(5) The court had thus held, *inter alia*, that the order of damages in the sum of RM120,000 be set aside and substituted with the amounts for LAD pursuant to cls. 22(2) and 24(2). The court also allowed general damages and affirmed the order for the return of the deposits with interest from the date the deposits were paid to the respondent till date of recovery. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Responden memasuki perjanjian-perjanjian jual beli ('PJB') dengan perayu-perayu bagi unit-unit di Kondominium Villa Perhentian ('Villa Perhentian'). Klausa 22(1) PJB memperuntukkan penyerahan milikan kosong dalam tempoh 36 bulan dari tarikh PJB masing-masing, sementara kl. 22(2) dan 24(2) memperuntukkan ganti rugi jumlah tertentu jika berlaku kelewatan. Walau bagaimanapun, selepas kira-kira 30% kerja-kerja pembinaan selesai, responden menangguhkan kesemua kerja, dan menawarkan untuk mengembalikan semula kesemua wang yang dibayar bagi harga belian. Perayu-perayu menolak tawaran tersebut. Kemudian, responden mengabaikan Villa Perhentian dan meneruskan untuk membina satu lagi kondominium yang dikenali sebagai 'the Saffron' atas tempat yang sama, untuk jualan. Perayu-perayu, oleh itu, memfailkan tuntutan-tuntutan terhadap responden, antara lain, untuk pelaksanaan spesifik dan/atau ganti rugi sebagai ganti, ganti rugi khas, ganti rugi am dan/atau ganti rugi teladan. Mahkamah Tinggi tidak membenarkan tuntutan perayu-perayu bagi

pelaksanaan spesifik PJB tersebut dan membenarkan ganti rugi sejumlah RM120,000 sebagai ganti. Mahkamah Tinggi selanjutnya memutuskan bahawa pengiraan ganti rugi berdasarkan nilai 'the Saffron' adalah salah tanggap dan bahawa jumlah yang dituntut di bawah ganti rugi tertentu dan ditetapkan ('LAD') dan tuntutan-tuntutan lanjut sebagai kerugian keuntungan dan ganti rugi teladan merupakan tuntutan kosong. Dalam rayuan ini, perayu-perayu menuntut, antara lain (i) ganti rugi sejumlah RM120,000 diketepikan dan digantikan dengan jumlah LAD menurut kl. 22(2) dan 24(2); (ii) ganti rugi am; dan (iii) perintah untuk pengembalian deposit. Dalam rayuan balas, isu-isu yang dibangkitkan oleh responden adalah: (i) sama ada award ganti rugi am boleh dibuat selepas penolakan pelaksanaan spesifik dalam ketiadaan kes yang diplidkan untuk ganti rugi; (ii) award RM120,000 sebagai ganti rugi tanpa apa-apa keterangan dan/atau hujahan oleh pihak-pihak adalah arbitrari.

Diputuskan (perintah sewajarnya)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 18(5) Akta Relief Spesifik 1950 ('Akta') memperuntukkan bahawa bidang kuasa yang diberikan di bawah s. 18 boleh dilaksanakan walaupun kontrak tidak boleh dilaksanakan. Oleh itu, perayu-perayu, setelah memohon untuk ganti rugi, berhak untuk dipertimbangkan bagi ganti rugi walaupun permohonan mereka untuk pelaksanaan spesifik ditolak.

(2) Pihak yang bukan dalam kemungkiran berhak untuk ganti rugi yang layak diterimanya di bawah undang-undang. Perayu-perayu berhak untuk menolak pengembalian semula deposit atau bayaran-bayaran yang dibuat dan memohon apa yang tertunggak di bawah PJB masing-masing. Walau bagaimanapun, adalah prinsip matan bahawa seseorang plaintif wajib mengambil langkah-langkah munasabah untuk mengurangkan kerugian akibat daripada kesalahan defendan. Perayu-perayu dalam kes ini sepatutnya mengambil langkah-langkah untuk mengurangkan kerugian mereka apabila telah ditetapkan bahawa Villa Perhentian bukan semata-mata ditangguhkan tetapi tidak akan diselesaikan langsung. Tanpa keterangan bila perayu-perayu menyedari perkara tersebut, tarikh tawaran

terakhir kepada mereka untuk pengembalian bayaran-bayaran adalah keterangan paling baik berkaitan dengan tempoh yang mana LAD bagi kelewatan adalah kena dibayar.

(3) Bagi kadar LAD, terma-terma dalam PJB tidak ditentukan oleh perayu-perayu. Sebaliknya, terma berkaitan dengan LAD adalah daripada responden. Sama ada kadar tersebut adalah terlalu tinggi tidak dibangkitkan sebagai isu oleh mana-mana pihak dan dengan itu, pemakaian s. 75 Akta tidak perlu dipertimbangkan.

(4) PJB masing-masing telah tidak boleh dilaksanakan bukan disebabkan oleh kesalahan atau kemungkiran perayu-perayu. Fakta menunjukkan bahawa responden memilih untuk memungkiri PJB dengan perayu-perayu. Berikutan s. 18(5) Akta, mahkamah tidak dihalang daripada mengawardkan ganti rugi, dan berikutan s. 18(2), mahkamah mesti mengawardkan pampasan dengan sewajarnya sebagai ganti pelaksanaan spesifik. Dalam keadaan tersebut, adalah wajar bahawa pampasan dinilai dengan membandingkan nilai pasaran biasa unit-unit yang boleh dibandingkan di kawasan berhampiran dan menolak daripadanya harga belian di bawah PJB dalam setiap kes. Perayu-perayu telah membayar 30% dan tidak ada keterangan bahawa mereka tidak berupaya membayar jika Villa Perhentian telah diselesaikan dan diserahkan seperti yang dijanjikan.

(5) Mahkamah dengan itu telah memutuskan, antara lain, bahawa perintah bagi ganti rugi sebanyak RM120,000 diketepikan dan digantikan dengan jumlah bagi LAD berikutan dengan kl. 22(2) dan 24(2). Mahkamah juga membenarkan ganti rugi am dan mengesahkan perintah untuk pemulangan deposit dengan faedah dari tarikh deposit dibayar kepada responden sehingga tarikh pemerolehan semula.

Case(s) referred to:

Cukurova Finance International Limited & Cukurova Holdings AS v. Alfa Telecom Turkey Limited [2013] UKPC 2 ***(refd)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Lee Poh Choo v. SEA Housing Corporation Sdn Bhd [1981] 1 LNS 25 ***(refd)***

Leong Lai Kuen v. Sentul Murni Sdn Bhd [2004] 5 CLJ 25 HC ***(refd)***

SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 75
Specific Relief Act 1950, ss. 18(2), (5), 28

For the appellants - Harpal Singh Grewal (Amar Dass & Reny Rao with him); M/s PS Sohanpal & Sidhu
For the respondent - Woon Ling Li (Mohd Izral Khairy with him); M/s Izral Partnership

[Editor's note: For the High Court judgment, please see Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd [2013] 1 LNS 98.]

Reported by S Barathi

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellants, Balbeer Singh a/l Karam Singh and six others, appealed to this court against the decision of the High Court made on 29 May 2012 in respect of their claim against the respondent company Sentul Raya Sdn Bhd.

[2] In their statement of claim, the appellants as plaintiffs had sought the following orders:

(a) specific performance and/or damages *in lieu* thereof;

(b) that the defendant do pay the plaintiffs special damages;

(c) that the defendant do pay each and every one of the plaintiffs abovenamed (second and third plaintiffs jointly and fifth and sixth plaintiffs jointly) general damages and/or exemplary damages in the amount of RM350,000;

(d) that the defendant do pay the plaintiffs interest at a rate to be determined by this Honourable (*sic*) Court;

(e) that the defendant do pay the plaintiffs costs of the action; and

(f) any such other and further relief as may be just and equitable in the circumstances.

[3] The draft order showed the High Court had ordered that:

(1) ... tuntutan Plaintif-Plaintif untuk perlaksanaan specific ditolak;

(2) sebagai balasan kesemua Plaintif yang dirujuk dalam kelima Perjanjian Jual Beli di beri gantirugi sebanyak RM120,000 bagi setiap perjanjian jual-beli;

(3) Defendan memulangkan deposit dan bayaran pendahuluan yang telah dijelaskan sebanyak 30% dari harga jualan;

(4) faedah pada kadar 4% setahun dari tarikh tuntutan bermula sehingga tarikh penghakiman; dan

(5) kos sebanyak RM40,000.00 (Ringgit Malaysia Empat Puluh Ribu).

[4] The background facts of this case may be summarised as follows:

(a) the respondent entered into sales and purchase agreements (SPA) in respect of units in Villa Perhentian Condominium with the first, second and third appellants jointly; fourth, fifth and sixth appellants jointly; and the seventh appellant on 9 December 1996 (RM196,660), 9 December 1996 (RM199,660), 13 November 1996 (RM189,460), 27 November 1996 (RM185,460) and 13 November 1996 (RM189,460) respectively;

(b) Clause 22(1) thereof provided for delivery of vacant possession within 36 months from the date of the respective SPAs, ie, between November to December 1999;

(c) Clauses 22(2) and 24(2) thereof provided for liquidated damages in the event of delay;

(d) the appellants paid on all progress payment claims;

(e) sometime at the end of January, after completing some 30% of the construction works, the respondent suspended all construction works;

(f) appellants were informed that the respondent's holding company, Taiping Consolidated Sdn Berhad had embarked on a corporate restructuring exercise;

(g) the respondent offered, by letters 11 August 2000, 18 August 2000, 26 July 2002 and 12 February 2002, to refund of all monies paid towards the purchase price, amounting to RM58,998, RM59,698, RM56,838, RM55,638, RM56,834 respectively, but the appellants declined;

(h) the second to seventh appellants were issued with notices of demand dated 3 October 2001 for the third progress payment pursuant to cl. 9(2);

(i) the first appellant made immediate payment;

(j) the second and third appellants paid on 16 October 2001;

(k) the fourth appellant paid on 10 October 2001;

(l) the fifth and sixth appellants paid by Cashier's Order No. 027075;

(m) the seventh appellant paid on 10 October 2001;

(n) the respondent abandoned the Villa Perhentian Condominium and built another condominium named "the Saffron" on the same site, for sale;

(o) the appellants filed their claim on 21 September 2005; and

(p) the Saffron was launched in 2006.

[5] Upon that background, the parties proceeded to argue that:

(a) the failure to complete the construction of the Villa Perhentian Condominium was due to the global economic crisis of 1997/1998;

(b) the respondent had offered refund of monies paid and alternative units at discounted prices;

(c) the respondent disputed the appellants' readiness, willingness and ability to complete their purchase and settle the balance of the purchase price;

(d) only the second, third, fifth and sixth appellants had secured loan financing in 1998 to fund their purchase;

(e) the respondent only launched the Saffron condominium in 2006; and

A (f) since the appellants' claim was instituted on 21 September 2005, their failure to make application to restrain or prohibit the respondent from proceeding with the Saffron condominium, meant that they have effectively abandoned their claim for specific performance.

B

[6] In its grounds of judgment, the High Court took into consideration and reasoned, *inter alia*, as follows:

(a) Clause 22(1) and clause 24(1) of the SPA contractually obligated the respondent to complete the construction and
C deliver vacant possession within 36 months from the respective dates of the SPA;

(b) it was undisputed that the respondent ceased works on the Villa Perhentian Condominium as early as January 1998 as at
D the scheduled completion date in December 1999 and at the date of institution of proceedings, the respondent was clearly in breach of its contractual obligations under the SPA;

(c) the issue of notices of demand dated 3 October 2001 for
E billing at the end of third stage of construction, and accepting that the appellants made payment thereon, conferred reasonable and legitimate expectation on the appellants of the respondent's ability to perform and fulfil their contractual obligation in accordance with the terms of the SPA, and thus
F were accordingly justified in their reliance on the respondent's clear and unequivocal representation of due delivery of units purchased under the SPA;

(d) but despite the respondent's creation of a legitimate expectation that the units would be completed and handed
G over as agreed, the respondent failed to deliver;

(e) the appellants were merely verbally informed that the Villa Perhentian Condominium would be scrapped, but during the long period of suspension the respondent did not notify nor
H alert the appellants of the intended abandonment of the Villa Perhentian Condominium;

(f) the letters offering refunds as late as 26 July 2002 and 12 August 2002 did not contain any notification that the Villa
I Perhentian Condominium would not be completed;

(g) the defence of frustration by the global economic crisis of 1997-1998 was rejected because the respondent replaced the abandoned Villa Perhentian Condominium with "the Saffron", which shows that the economic crisis clearly did not frustrate the execution of construction works on the site since notwithstanding the crisis, the respondent was able to replace the earlier development with a revised high end condominium to their benefit and apparent advantage;

(h) the appellants were clearly ready, willing and financially capable, of continuous performance of their respective contractual obligation under the SPA, and could not be faulted and were not guilty of any lapses or failing in the performance of their contractual obligation;

(i) the respondent's offers of refund monies and of alternative units, had consistently and persistently been rejected;

(j) however, it was also clear that at the date of the institution of legal proceedings on 21 September 2005, the Villa Perhentian Condominium had remained largely uncompleted;

(k) given the stage of completion of the Villa Perhentian Condominium which had merely attained 30% at the material time of the defendant's cessation of construction works, and given the ensuing substantial termination of the sales and purchase agreements by the majority of purchasers of units in the Villa Perhentian Condominium, it must be apparent to any "reasonable and fair minded person that plaintiffs' persistent and adamant insistence for specific performance and delivery of vacant possession of the property was, but a futile quest. The High Court accordingly disallowed plaintiffs' claim for specific performance of "the SPA" and, *in lieu*, allowed damages as prayed in para. 30(1) of plaintiffs' statement of claim;

(l) held that given the peculiarity and special circumstances of the case, damages was a more appropriate remedy to address the appellants' grievance and loss;

(m) the respondent had completed a relatively nominal stage of the Villa Perhentian Condominium construction at the material time and the majority of the purchasers had terminated their SPA. ... At the material time of the suit, the replacement of the Villa Perhentian Condominium, the Saffron, was nearing completion and about to be launched;

(n) the appellants had paid a relatively nominal fraction of the total purchase price and in the light of the substantial termination of "the SPA" by the majority of the purchasers as early as 2001-2002, the futility of insistence on specific performance of the SPA ought reasonably have been within the appellants' contemplation;

(o) despite insistence for specific performance, no actions were found to have been taken to restrain or prohibit the development of the 'revised' Villa Perhentian Condominium, "the Saffron", which was launched in 2006;

(p) "8.5 Therefore, despite plaintiffs' undisputed apparent continuous readiness and capability to complete "the SPA", the glaring reality on the ground was that, the defendant unlike the plaintiffs was not equally ready or capable to execute the same. The court, having regard to the facts and surrounding circumstances of this case, finds that this is a fit and proper case not to grant plaintiffs' claim for specific performance of "the SPA" and, accordingly *in lieu* of specific performance awarded the plaintiffs, compensatory damages for the stated sum of RM120,000 against each SPA";

(q) "The Saffron" was clearly an entirely different development with different contractual terms including different description, specification and purchase prices. Assessment of damages on the basis of value of "the Saffron" is misconceived. The value of "The Saffron" unit at RM497,000 is irrelevant;

(r) noted the amounts claimed under liquidated ascertained damages and the further claims of RM300,000 as loss of profit and exemplary damages of RM350,000, and held that in the absence of evidentiary proof of damages and losses, the claim for loss of profit of RM300,000 for each unit, and RM350,000 for exemplary damages constitute bare claims;

(s) though the appellants were legally entitled to liquidated ascertained damages pursuant to cls. 22(2) and 24(2) of the SPA, the long period of abandonment of works make apparent the inevitable and imminent abandonment of the Villa Perhentian Condominium. The court accepted the appellants' underlying reason for continuous insistence and claim for specific performance was futile, and in view of the respondent's clear inability to continue their contractual obligation, as early as 2001-2002 when defendant's offers of

refund were effected, the appellants owed a duty to mitigate their losses. Thus, they should not under the guise of keeping the SPA alive be allowed to benefit continuously and indefinitely from the respondent's clear contractual liability to pay liquidated ascertained damages pursuant to the calculation provided in the SPA;

(t) accordingly, the High Court *in lieu* of specific performance, awarded damages in favour of the plaintiffs for the amount of RM120,000, ordered the respondent to refund to the respective appellants all payments made towards their purchase, with interest and costs in the sum of RM40,0000;

(u) the appellants' steadfast and unyielding insistence for the Villa Perhentian Condominium completion, is unreasonable and unrealistic, and "Given the stark and glaring reality of the defendant's inevitable Villa Perhentian Condominium incompletion, it would be unjust and inequitable for the court to award damages for the amount as were prayed by the plaintiffs."

Submissions For Appellants

[7] In the appeal, the point was made for the appellants that:

(a) since as at the date of filing of the claim the units purchased could not be delivered, the appellants are entitled to liquidated and ascertained damages. Further, the instant case is also distinguishable from cases of merely delayed delivery. In this case, no unit is delivered and the appellants are entitled, *in lieu* of specific performance, to damages to be assessed for the loss of the enhancement of value of the units had they been delivered;

(b) *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And other Appeals* [2008] 4 CLJ 618; [2008] 4 MLJ 852 FC, 860 established that additional remedies are not excluded under the Housing Developers (Control and Licensing) Act 1966 & Regulations 1989 & 1991;

(c) the High Court in *Lee Poh Choo v. SEA Housing Corporation Sdn Bhd* [1981] 1 LNS 25; [1982] 1 MLJ 324 and approved by the Federal Court in *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305; [1982] 2 MLJ 31 FC established that a claim for loss of use and enjoyment of the building by way of rental is maintainable;

(d) per the valuation report of one Mr Lee Pak Ling (PW3), the market value of the units were RM497,000 and the general damages may be calculated as the difference between the market value and the purchase price, thus ranging from RM297,340 for the second and third appellants to RM311,540 for the fifth and sixth appellants.

[8] Accordingly, it was prayed that:

(a) the order of damages in the sum of RM120,000 be set aside, and be substituted with the amounts for liquidated and ascertained damages pursuant to cls. 22(2) and 24(2);

(b) general damages as calculated above be ordered with interest from the date of judgment till the date of settlement; and

(c) the order for the return the deposits be affirmed except that interest be ordered thereon from the date the deposits paid to the respondent till date of recovery.

[9] The above prayers at the appeal made it clear that the appellants accepted the dismissal of their prayer for specific performance, special damages and exemplary damages.

Submissions For The Respondent

[10] In the light of the above, it is necessary only to consider that part of the submissions for the respondent in reply and on the respondent's cross-appeal, on the issues whether:

(a) an award of general damages may be made after refusing specific performance in the absence of a pleaded case for damages;

(b) the award of RM120,000 as damages in the absence of any evidence and/or submissions by the parties is arbitrary;

(c) the High Court erred:

(i) in ordering refund in addition to damages;

(ii) in failing to follow the decision in *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; and

(iii) in ordering interest to be calculated from 21 September 2005 (date of the action was filed) until the date of judgment.

[11] In the submissions on the above, the point made for the respondent may be summarised as follows: A

(a) This was a case where the appellants were keeping their respective SPAs alive and seeking to reap benefit from the liquidated and ascertained damages provision, when they knew that the Villa Perhentian Condominium was abandoned; B

(b) Calculation of the damages on the value of "The Saffron" is misconceived, as "The Saffron" is different from the Villa Perhentian Condominium and was launched in 2006. C

Our Reasoning And Conclusion

[12] Section 28 of the Specific Relief Act 1950 provides as follows: D

> Bar of suit for breach after dismissal
>
> 28. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of the contract or part, as the case may be. E

[13] On the other hand s. 18 of the same Act provides:

> Power to award compensation in certain cases
>
> 18. (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance. F
>
> (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly. G
>
> ILLUSTRATION
>
> … H
>
> (3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. I

ILLUSTRATION

...

(4) Compensation awarded under this section may be assessed in such a manner as the court may direct.

(5) The circumstance that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

ILLUSTRATIONS

(a) A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of patent. Before the hearing of the suit the patent expires. The court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

(b) A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award A compensation for the non-performance.

[14] In our view, there is no conflict between s. 18 and s. 28. Section 28 applies where the suit is only for specific performance, and s. 28 does not apply to restrict s. 18 which specifically authorises any person suing for specific performance to seek compensation for its breach, either in addition to, or in substitution for, its performance. In the instant appeal, the appellants had sought the reliefs referred to in para. 2 above.

[15] We hold, therefore, that the appellants, having prayed for damages, are entitled to consideration for damages even if their prayer for specific performance was dismissed. Further, s. 18(5) provides that the jurisdiction conferred under s. 18 may be exercised notwithstanding that the contract, as in this case, had become incapable of performance.

[16] Counsel for the respondent submitted upon the concern that the appellants were keeping their respective SPAs alive in order to reap benefit from the liquidated ascertained damages. Counsel relied upon *Leong Lai Kuen v. Sentul Murni Sdn Bhd* [2004] 5 CLJ 25, where the headnotes state as follows:

> [1] Based on the authorities, the plaintiff had a right to claim for damages specified under a rescinded contract. However, the claim for liquidated damages for non-delivery of vacant possession would be subjected to s. 75 of the Contracts Act 1950. The plaintiff was only entitled to receive from the defendant reasonable compensation not exceeding the amount so named or the penalty stipulated for. The court has to decide what is reasonable. Otherwise, damages due to a purchaser under the formulated method of calculation stipulated in the agreement may amount to a colossal sum for an abandoned project. The purchaser may refuse to rescind or choose to rescind at a very late stage so as to enjoy the higher rate of calculating compensation. (pp. 31 b & 32 d-h).

[17] We do not think that a court should be deterred from awarding a sum as damages merely because it appears colossal. More to the point is that the court must assess the damages in accordance with law and established principles. It cannot rewrite a contract itself so that the damages becomes affordable to a defendant. A party not in breach is entitled to damages that the party is entitled to under the law. The appellants were entitled to refuse refund of deposits or payments made and seek what is due under their respective SPAs. However, it is a settled principle that a plaintiff is under a duty to take reasonable steps to mitigate the loss consequent upon a defendant's wrong. In this case, the appellants could have taken steps to mitigate their losses when it became certain that the Villa Perhentian Condominium was not merely suspended but would not be completed at all. When the appellants became aware of it is only known to them. In the absence of evidence when they became aware, the best available evidence is the date of the last offer to them to refund the payments they had made, ie, 26 July 2002. This applies in respect of the period for which liquidated ascertained damages for delay is payable.

[18] As to the rate for liquidated ascertained damages, the terms of the SPAs were not dictated by the appellants, but, including the term as to the rate for liquidated ascertained damages, was from the respondent. Whether the rate was too high has not been

raised in issue by either party. Hence, it does not call for consideration of the application of s. 75 as in *Leong Lai Kuen v. Sentul Murni Sdn Bhd (supra)*. We bear in mind the opinion of the Judicial Committee of the Privy Council in *Cukurova Finance International Limited & Cukurova Holdings AS v. Alfa Telecom Turkey Limited* [2013] UKPC 20 in relation to submissions as to a high rate of interest:

> As for the high rate of interest, it is true that 8% over LIBOR does strike me as steep, especially for a secured loan, but a lawyer's assessment, even (or, perhaps, all the more) a judge's assessment, of a particular contractual interest rate is of questionable value. The rate of 8% over LIBOR is the rate which was agreed between the parties, both very large commercial companies, after arm's length negotiations. It is therefore scarcely reasonable for CH and CFI to complain of the rate continuing to apply, unless there is a special factor at work. No special factor has been identified here.
>
> While the same points can be made about the default interest rate of 11.5% above LIBOR as about the basic rate of 8% over LIBOR, there could be a question as to whether the extra 3.5% was a penalty, from which relief could be granted. In addition to the equity of redemption and relief from forfeiture, equity developed a jurisdiction to relieve against penalties. While a default interest rate may be a penalty against which equity will relieve (see e.g. *Stanhope v. Manners* (1763) 2 Eden 199), it was not argued that the extra 3.5% per annum in this case could be so treated. It seems to me that this was realistic on the part of Mr. MacLean. Particularly in the context of a contractual rate of 8% over LIBOR, the default rate in the present case, which predicates an increased risk due to the very existence of a default, could not, I think, fairly be characterized as penal, at least on its own.
>
> As to the length of the period for which this rate of interest is to run, it cannot be doubted that six years between forfeiture and relief is a very long time indeed for a gap between a tender of the mortgage debt and the court upholding the mortgagor's right to redeem. However, most of the delay can fairly be said to be attributable to CH and CFI, *albeit* not in the sense of any wrong-doing on their part.

[19] As to specific performance, quite obviously the respective SPAs have become incapable of performance through no fault or breach of the appellants. No evidence was adduced why, after recovery from the global financial crisis, the suspended Villa

Perhentian Condominium could not be revived. Instead, the respondent elected, in 2006, to launch "The Saffron". In a real sense, the facts show that the respondent chose to breach the SPAs with the appellants. Clearly, pursuant to s. 18(5) of the Act, the court is not precluded from awarding damages, and pursuant to s. 18(2), holding that in the circumstances of impossibility specific performance ought not to be granted, but that there being a contract between the parties which has been broken by the respondent and that the appellants are entitled to compensation for that breach, the court must award compensation accordingly *in lieu* of specific performance. It is appropriate, in the circumstances, that such compensation be assessed by the Deputy Registrar of the High Court by comparison with an average market values of comparable units in the vicinity and deducting therefrom the purchase price under the SPAs in each case. We are mindful that the appellants paid 30%, but they were not the parties in breach. Further, there is no evidence that they are in any difficulty to make payment had the Villa Perhentian Condominium been completed and delivered as agreed.

[20] We, therefore, in respect of the appeal and cross-appeal order that:

(a) the order of damages in the sum of RM120,000 be set aside, and be substituted with the amounts for liquidated and ascertained damages pursuant to cls. 22(2) and 24(2) from 36 months from the date of the respective SPAs to 26 July 2002 with interest from the date of the writ to date of full settlement;

(b) general damages as assessed with interest from the date of judgment till the date of settlement;

(c) the order for the return of the deposits is affirmed, with interest thereon from the date the deposits were paid to the respondent till date of recovery;

(d) costs here in the sum of RM10,000; and

(e) deposit to account of costs.